

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0361

Sales and Use Tax

Calendar Years 1989, 1990, 1991, 1992, 1993, 1994, 1995, and 1996

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ISSUE(S)

I. **Gross Retail Tax** – Exempt Transactions of a Retail Merchant

Authority: IC 6-2.5-2-1(a); IC 6-2.5-4-5(c); 45 IAC 2.2-5-8(k)

Taxpayer protests the inclusion of wholesale sales subject to tax.

II. **Tax Administration** – Penalty

Authority: I C 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is engaged in several seasonal business activities. During the summer the taxpayer sells fireworks from numerous Indiana locations. In the fall, the taxpayer operates a haunted house and sells Halloween costumes and supplies. The fireworks stores have several different names, the haunted house operated under another name, and the costume sales, yet another. The taxpayer was previously registered to collect sales tax, then cancelled registration and still ran its business of selling its wares.

The audit included all wholesale sales in the assessment because the taxpayer had no records for these sales. The department does not know if these are actually wholesale. The auditor had requested this information on several occasions but no detail has been provided to date. Although the auditor states that the taxpayer made wholesale sales but failed to keep records, in the audit report the wholesale sales are segregated.

I. **Gross Retail Tax** – Exempt Transaction of a Retail Merchant

DISCUSSION

At issue is whether the taxpayer's wholesale sales as shown on its records will suffice to allow exemption from sales tax.

Taxpayer has not provided the auditor nor the department with exemption certificates or other proof that the sales "wholesale" are actually those types of sales or are exempt from sales tax.

Taxpayer however states it made sales to wholesalers and has its retail sales and wholesale sales segregated on the books. The auditor only assessed tax because no exemption certificates were on file.

Under IC 6-2.5-4-2(a), a person making wholesale sales is a retail merchant. A wholesaler may accept from its customers properly executed exemption certificates in lieu of collecting sales tax on purchases provided the customers are registered as retail merchants and the purchases qualify for exemption. Therefore, as a wholesaler, the taxpayer is only authorized to make tax exempt wholesale sales to registered retail merchants who provide a properly executed exemption certificate. Similar restrictions apply to the taxpayer when it acts as a retail merchant.

Indiana Code 6-2.5-4-1 provides that "a person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he

- 1) acquires tangible personal property for the purpose of resale; and
- 2) transfers that property to another person for consideration."

Indiana Code 6-2.5-8-8 further specifies who may purchase items exempt from a retail merchant.

Specifically, Indiana Code 6-2.5-8-8(b) provides the following are the only persons authorized to issue exemption certificates:

- 1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
- 2) organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21; IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter; and
- 3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

The department has no proof to whom the sales were made, or whether the sales are exempt. IC 6-2.5-3-7 (b) further states that a retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant received from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

FINDING

Taxpayer's protest is denied. Taxpayer was not properly registered with the department, did not retain invoices and had no exemption certificates for sales classified as "Wholesale Sales".

II. **Tax Administration** – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states its members believed the Purchaser's Agreement approved by the Indiana Fireworks Distributors Association acted as an exemption for sales.

Taxpayer, however, is a nonfiler and has been in business at various locations in Indiana since 1987. It has filed ST103's sporadically for one location and in 1988 for two other locations. It has had, on and off, approximately fifteen (15) other locations in Indiana. These locations were never registered for sales tax.

FINDING

Taxpayer's protest is denied.